

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID J. CAMPBELL)	
Claimant)	
VS.)	
)	Docket No. 187,424
GUNNING WHOLESALE, INC.)	
Respondent)	
AND)	
)	
CINCINNATI CASUALTY COMPANY)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

On July 11, 1997, the applications of the respondent and the Kansas Workers Compensation Fund (Fund) for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark on February 25, 1997, came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, James B. Zongker of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Jeffery R. Brewer of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Steven L. Foulston of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Was written claim timely submitted by claimant pursuant to K.S.A. 44-520a?
- (2) Nature and extent of claimant's injury and/or disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record found herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

Claimant, a 48-year old long-term employee of respondent, on August 13, 1992, tripped on the threshold of a hotel door and fell head first into a marble wall. He suffered pain in his neck, shoulders, left leg, and left arm. At the time, claimant was working at a trade show in Chicago, and did conclude the trade show. Claimant has a history of spinal cord injuries beginning when he was 16 years old and has had a visible limp for a substantial period of time.

Claimant continued performing his job duties through June 1, 1993, but his condition continued to deteriorate. By June 1, 1993, he was no longer able to physically perform his job. He informed respondent and stopped working. He did continue on respondent's payroll until approximately September 1993 at which time he began collecting disability benefits.

Claimant had had substantial problems for the several years and had suffered a foot drop along with the limp since 1963. He suffered additional low back pain after the fall in August 1992 and changed to a less strenuous job. The employer accommodated claimant for as long as possible.

Claimant began receiving disability benefits on September 30, 1993, and was receiving social security disability benefits at the time of the regular hearing.

Two physicians testified in this matter. Joe D. Davison, M.D., board certified in family practice medicine, has been claimant's family physician since February 1989. Dr. Davison discussed claimant's history of spinal injuries, including the fact that claimant suffered a cervical spinal cord injury in 1963 resulting in a neck fusion. Claimant's employer was aware of the preexisting neck injury and fusion.

After the August 1992 injury, Dr. Davison noted claimant began complaining of increased pain which Dr. Davison opined was directly related to the fall. By August 1993, claimant was having more trouble ambulating through the office, was experiencing increased pain, was unable to sit in the examination room for any extended period of time without having to shift and move and was experiencing muscle spasms in his legs. Dr. Davison opined that claimant had a functional impairment of 15 to 32 percent before the

fall in 1992. After the fall, he felt claimant's impairment had increased to between 53 and 64 percent to the body as a whole on a functional basis.

On June 8, 1994, the Administrative Law Judge ordered an independent medical examination with Dr. Philip R. Mills. Dr. Mills diagnosed claimant with a remote C5-C6 cervical fracture with incomplete spinal cord injury from the August 13, 1992, accident that aggravated the prior condition. Dr. Mills felt that claimant's condition would preclude him from working.

Dr. Davison opined that the workload on claimant, coupled with the fall in 1992, accelerated his preexisting condition. He did not believe claimant could continue to perform his job. Claimant exhibited difficulty in walking and had no balance. He could not walk more than five feet without a cane and could not be on his feet for extended periods of time.

The original E-1 Application for Hearing filed in this matter displayed an accident date of August 13, 1992. At the regular hearing held on July 18, 1994, the attorney for the claimant requested that the accident date be amended to include a series of injuries through June 1, 1993. The Administrative Law Judge in the Award found claimant suffered accidental injury through June 1, 1993. The parties stipulated that written claim was submitted by claimant on August 26, 1993, and again on September 22, 1993. If an accidental injury date of June 1, 1993, is found, the parties acknowledge written claim would be timely. Respondent, however, denies the 1993 accident date arguing that August 13, 1992, is the only accident date upon which an appropriate award can be based.

Claimant was referred to only one vocational specialist, Mr. Jerry Hardin, who felt that claimant had lost 100 percent of his ability to perform work in the open labor market and 100 percent of his ability to earn a comparable wage. The Administrative Law Judge in considering Mr. Hardin's opinion awarded claimant a 100 percent permanent partial disability.

CONCLUSIONS OF LAW

The Appeals Board will first consider the appropriate date of accident in this matter. The parties acknowledge August 13, 1992, as the date when claimant fell. Claimant contends his condition worsened through June 1, 1993, at which time he was forced to quit working. Respondent also acknowledges the August 13, 1992, date but argues all of claimant's symptoms stem from that date with no additional aggravation thereafter.

Claimant testified that his condition deteriorated through June 1, 1993, as a result of his work. Dr. Davison noticed that claimant's condition continued to worsen after August 1992, with claimant needing two canes to ambulate. Overall, he felt claimant's condition had deteriorated and claimant's functional impairment had substantially increased. Dr. Mills felt the activity claimant was doing at work would aggravate and accelerate his condition.

The Appeals Board, in considering Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), finds that June 1, 1993, claimant's last day worked, is the appropriate date of accident and, therefore, the written claim requirements of K.S.A. 44-520a are satisfied.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board notes, as did the Administrative Law Judge, that only one doctor discussed claimant's impairment of function. Dr. Davison found that claimant had a 53 to 64 percent impairment of function to the body as a whole. The Administrative Law Judge found a 60 percent permanent impairment of function for the purpose of his Award. The Appeals Board agrees and adopts those findings as its own.

K.S.A. 1992 Supp. 510e states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment.

K.S.A. 1992 Supp. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993), held:

The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with the legislative intent.

Dr. Davison felt claimant's condition would continue to get worse and that claimant was physically incapable of returning to his employment with respondent. Dr. Mills was of the opinion claimant was not capable of performing any type of work that would require him to work eight hours a day, five days a week. He also felt that the type of activity claimant was doing at work would aggravate and accelerate his condition.

In considering the seriousness of claimant's condition, the fact that it continues to worsen and the fact that claimant is incapable of returning to full time employment, the Appeals Board finds that claimant is essentially and realistically unemployable. Therefore, the Appeals Board finds, pursuant to K.S.A. 1992 Supp. 44-510c(a), that claimant is permanently totally disabled at this time.

This opinion is further supported by Mr. Jerry Hardin, the only vocational expert to testify in this matter, who opined that claimant has lost 100 percent of his ability to perform work in the open labor market and 100 percent of his ability to earn comparable wages. The Appeals Board acknowledges case law where an injured employee was found to be 100 percent permanently partially disabled without being permanently totally disabled. However, the facts in this matter do not limit themselves to such a finding. In addition, the prior Appellate Court cases, which found 100 percent permanent partial disability without finding permanent total disability, dealt with a different standard under the pre-July 1, 1987, version of K.S.A. 44-510e. In Bigger v. Kansas Dept. Of Revenue, 11 Kan. App.2d 108, 715 P.2d 1038 (1985), the Kansas Court of Appeals found a 100 percent permanent partial disability without permanent total disability when considering a work disability standard evaluating the ability of the worker to engage in work of the same type and character he was performing at the time of his injury. Under this pre-1987 standard of work disability, it is conceivable a worker would be incapable of performing work of the same type and character but still capable of working and earning wages at a different job. Under the version of K.S.A. 44-510e applicable to this matter, the Appeals Board must consider claimant's ability to perform work in the open labor market and the ability to earn comparable wages. It is difficult to comprehend a claimant who has lost 100 percent of his ability to perform work in the open labor market and 100 percent of his ability to earn comparable wages who is not permanently and totally disabled. The Appeals Board finds that the Award of the Administrative Law Judge should be modified to grant claimant a permanent total disability for the injuries suffered through June 1, 1993.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 25, 1997, should be, and is hereby, modified and an Award of compensation is granted in favor of the claimant, David J. Campbell, and against respondent, Gunning Wholesale, Inc., and its insurance carrier, Cincinnati Casualty Company, and Kansas Workers Compensation Fund, for accidental injury sustained through June 1, 1993, for a permanent total disability.

Claimant is entitled to \$299 per week beginning June 1, 1993, not to exceed \$125,000 for a permanent total disability. As of March 27, 1998, claimant is entitled to 251.43 weeks permanent total disability compensation at the rate of \$299 per week totalling \$75,177.57 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, the remaining balance of \$49,822.43 shall be paid at the rate of \$299 per week until fully paid or until further order of the director.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent, its insurance carrier and the Kansas Workers Compensation Fund pursuant to the agreement between the parties to be paid as follows:

Barber & Associates	
Transcript of regular hearing	\$291.30
Deposition of Philip R. Mills, M.D.	\$203.60
 Ireland Court Reporting	
Deposition of Jerry D. Hardin	\$266.40
Deposition of Joe D. Davison, M.D.	\$337.40
 Kelley, York & Associates, Ltd.	
Deposition of David James Campbell	\$126.40

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Jeffery R. Brewer, Wichita, KS
Steven L. Foulston, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director